IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 403 of 2001

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JAGDISHBHAI @ JEKI DHONDUBHAI PAWAR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 403 of 2001
MS SADHANA SAGAR for Appellant
THROUGH JAIL for Appellant
MR IM PANDYA, APP for Respondent

CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 21/07/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.P.DHOLAKIA)

This appeal has been filed by the convict-prisoner against the judgment and order dated 12-10-2000 passed by the learned Addl. Sessions Judge, Surat at Vyara, in Sessions Case No.175 of 1998 whereby he has convicted the present appellant for the offence punishable under Sec.304 (Part-I) of IPC and awarded sentence to suffer S.I. for 8 years and to pay fine of Rs.500/- in default to suffer S.I. for two months more.

2. The facts leading to the present appeal are that younger sister of the complainant namely, Mangalben got married with Jagdish @ Jeki Dhondubhai and they were residing just adjoining to the house occupied by Daguben who is the complainant as well as sister of the deceased Mangalben. On 12-6-1998 at about 10.00 a.m., the deceased gave Rs.40/- to accused for purchasing undergarments. Instead of purchasing undergarments, he purchased only banian and spent Rs.20/- in consuming alcohol and hence, quarrel took place between them. Thereafter, the accused sprinkled kerosene on Mangalben and set her on fire. As Mangalben shouted for help, Daguben, her mother Gomtiben and one Raghunath rushed there and immediately taken her to Government Health Centre. She remained there as an indoor patient for 12 days. Hence, a complaint was lodged initially by the elder sister of the deceased with Songadh Police Station for the offence punishable under Sec.307 of IPC registered as Songadh Police Station C.R.No.63 of 1998 and police started investigation. During the course of investigation, even Executive Magistrate was called and dying declaration of the deceased was recorded. As the deceased succumbed to the injuries on 23-6-1998, Sec.302 of IPC was added. At the end of investigation, charge-sheet was submitted against the present appellant. As the offence was exclusively triable by the Court of Sessions, it was transferred in the Court of learned Addl. Sessions Judge, Surat at Vyara, wherein charge was framed against the accused who pleaded not guilty and claimed to be tried.

2.1 To prove the guilt against the accused, prosecution had examined Surendrabhai Ramjibhai Patel as P.W.No.1 at Ex.8, who was In-Charge Medical Officer of Government Health Centre, Songadh, where Mangalben was brought for treatment and from where she was shifted to Sardar Smarak Private Hospital, Bardoli, and through him prosecution proved the injury certificate of the deceased

Ex.9. The prosecution had also examined Dr.Sanjiv Ranjan Karan as P.W.No.2 at Ex.10 who performed post mortem on the body of the deceased on 23-6-1998 and through him, post mortem report Ex.11 was proved by the prosecution. He had deposed in his evidence that the deceased had received 70-80% burns injury which was superficial and deep burns. Next witness is the complainant-Daguben Prakashbhai who is the sister of the deceased and who was examined as P.W.No.3 at Ex.19. She has given the evidence in support of the complaint. According to her, she is the witness of the incident. Gautamben Raghunath, who is the mother of the deceased, was examined by the prosecution as P.W.No.4 at Ex.21. According to her, deceased had narrated the incident before she was taken to the Govt. Health Centre. Maternal uncle of the deceased, Shri Sukhdev, who was examined as P.W.No.5 at Ex.22 had deposed that he reached at the place of incident later in point of time. Prosecution had also examined wife of Shri Sukhdev as P.W.No.6 at Ex.23, who had deposed that at the time of incident, she was at her house and reached the place of incident later on. Panch witness, Shri Rajubhai Ajitbhai, was also examined as P.W.No.7 at Ex.25 through him inquest panchnama Ex.27 and panchnama of scene of incident was proved by the prosecution. Executive Magistrate, Shri Prakashbhai Kanaiyalal Bhatt, was also examined by the prosecution as P.W.No.8 at Ex.28. It was deposed by him that on receipt of yadi Ex.29, he went to the hospital on 12-6-1998 and recorded the dying declaration of the deceased Mangalben. As per her say, he had also obtained opinion of the doctor regarding the mental condition of the deceased in giving dying declaration and through him, yadi Ex.29 and dying declaration Ex.30 were proved. To prove the arrest panchnama of the accused, prosecution has examined, Shri Shankarbhai Babubhai Konkani as P.W.No.9 at Ex.31. Thereafter, prosecution has submitted closing purshis. Therefore, further statement of the accused under Sec.313 of the Code of Criminal Procedure was recorded by the learned Addl. Sessions Judge and, thereafter, after giving opportunity to the learned advocates appearing for the respective parties, accused was held guilty vide aforesaid judgment and order dated 12-10-2000.

3. We have heard Ms.Sadhana Sagar, learned counsel for the appellant and Mr.I.M.Pandya, learned APP for the respondent-State.

4. It is mainly argued by Ms.Sadhana Sagar, learned counsel for the appellant that there are no eye witnesses and there are material contradictions in the dying declaration. Initially, deceased and her relatives have

given the history of suicide but due to change in the version later on, dying declaration became doubtful and hence, court ought not to have relied upon the said dying declaration. The complainant, who is the mother of the deceased, and maternal aunt are not the eye witnesses though they boast themselves to be the eye witnesses and in absence of any eye witness, there are no evidence on record to prove that the present appellant had sprinkled kerosene on the deceased and set her afire. Showing us the oral evidence of Surendrabhai Ramjibhai and three witnesses namely, complainant-mother of the deceased, maternal aunt and uncle of the deceased, it is argued that all three witnesses had reached at the place after the incident and, therefore, they are not the witnesses to the incident. It has also been argued that deceased had received 70-80% superficial as well as deep burn injuries and, therefore, she was not in a fit mental state to give the dying declaration. In view of the above, it is submitted that when there are no evidence on record to convict the accused, Court below ought to have acquitted the accused.

4. Mr.Pandya, learned APP, has argued that in all there are three dying declarations. Immediate version is the one which the deceased had given to her mother and her maternal aunt and others. Dying Declaration Ex.30 recorded by the Executive Magistrate after completion of due formalities is trustworthy and there is no reason to disbelieve the same as it was recorded by an independent person. He has also taken us through dying declaration Ex.30 and oral evidence of both the doctors and oral evidence of mother and maternal aunt of the deceased. It is further argued that evidence has been recorded after a period of three years of the incident and, therefore, there will be some contradiction or omission on the part of witnesses. As they are tribals, there are bound to be some omission or contradiction. One or two lines cannot be picked up somewhere from the deposition but overall view is required to be ascertained and if Court comes to the conclusion that it is trustworthy, then it can be relied upon. He has taken us through the evidence of Prakashbhai Kanaiyalal Bhatt and argued that his evidence is contrary to the history alleged to have been written in case paper which, according to Mr.Pandya, is important point for consideration. He has relied on the case of P.V.Radhakrishna Vs. State of Karnataka, AIR 2003 S.C. page 2859 wherein it was held at Head note 'B' as under:

(B) Evidence Act (1 of 1872), S.32--Penal Code (45 of 1860), S.300-Dying declaration--Can be sole basis for conviction--Since a person on

death bed is in a situation so solemn and serene equal to obligation of oath--Requirement of oath and cross-examination also dispensed with for same reason--That apart, declarant victim being only eye witness--Exclusion of his statement, may deflect ends of justice--Court, of course, has to be on guard that declaration was true and voluntary."

He has also placed reliance on another case of Laxman Vs. State of Maharashtra, AIR 2002 S.C. page 2973 wherein head note 'A' reads thus:

"Evidence Act (1 of 1872), S.32--Dying declaration -- Recording of -- Absence of certification of doctor as to fitness of mind of declarant -- Would not render dying declaration not acceptable -- What is essentially required is that person who records it must be satisfied that deceased was in fit state of mind --Certification by doctor is rule of caution -- Thus voluntary and truthful nature of declaration can be established otherwise."

5. We have gone through the oral evidence as well as the documentary evidence shown by the learned counsel appearing for the respective parties. There are more than three dying declarations one of which is recorded by the Executive Magistrate in the hospital itself at the earliest opportunity on the date of incident. We have carefully gone through the same and we find that the same is in question answer form and is trustworthy. In column No.7, the Executive Magistrate has narrated the incident and from the answer given by her, it is clear that she was in a conscious state of mind to give answers to each question properly. It appears that opinion of the doctor has also been obtained by the Executive Magistrate which is part of the said dying declaration Ex.30. The Executive Magistrate has been examined by the prosecution as P.W.No.8 at Ex.28 and nothing has come out from his cross-examination. In his cross-examination, he has categorically stated that on each question being asked to her, she has replied properly which have been noted down. He has also obtained opinion from the doctor also in recording dying declaration. However, in his cross-examination, he has fairy admitted that he has not asked for separate certificate from the doctor since endorsement has been made by the doctor. Facts remain that opinion has been given by the doctor by way of endorsement in the dying declaration and there is no reason to disbelieve the say of the concerned person who

has discharged his duty as a part of service and, therefore, he can be treated as an independent witness. Similarly within few seconds of the incident, mother of the deceased went to the scene of offence where she saw the deceased lying in burning condition and where she was given narration of the incident to her mother and in turn the mother has deposed the same to the Court. Same has been narrated by her before her maternal aunt and her sister also though they came later on at the scene of offence. Hence, it is established beyond reasonable doubt that mother of the deceased reached there at the earliest as is reflected from the evidence of the prosecution which is the map prepared by the Circle Officer stating that the mother and the deceased were staying in adjoining house. Her evidence cannot be discarded more particularly when she is the mother of the victim. In these circumstances, we are of the opinion that the dying declaration of the deceased is trustworthy.

6. In view of the above referred trustworthy dying declaration along with other cogent evidence on record connect the appellant with the crime in question, the guilt against the present appellant has been proved beyond reasonable doubt by the prosecution with motive and hence, conviction was ordered by the court below under Sec.304 Part-I of IP Code. However, when the case has been proved against the accused beyond reasonable doubt with motive, the conviction ought to have been higher. Hence, in view of the principles laid down by the Apex Court in the aforesaid judgments relied upon by the learned APP, this appeal does not merit any consideration. Hence, this appeal is required to be dismissed.

7. The appeal is dismissed.

(R.P.DHOLAKIA,J.)

(SHARAD D.DAVE,J.)
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